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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

BRIEF ON BEHALF OF ARIZONA CORPORATION COMMISSION ET AL., INTERVENERS.

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INTERVENING STATE COMMISSIONS

This brief is filed on behalf of the following state commissions and boards, intervening defendants herein: Arizona Corporation Commission, Arkansas Railroad Commission, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commis-

sioners of North Dakota, Corporation Commission of Oklahoma, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of South Dakota, and Public Service Commission of the State of Wyoming.

OPINION BELOW

The opinion of the court below is reported 51 Fed. (2d) 510. The decision of the Interstate Commerce Commission, in the proceeding in which the order was made which is under attack herein, is reported 164 I. C. C. 619.

STATEMENT OF THE CASE

This case arises upon an appeal from an order of the United States District Court for the Northern District of Illinois denying an interlocutory injunction to restrain the enforcement of an order of the Interstate Commerce Commission prescribing maximum rates on grain and grain products moving in the Western District and in the State of Illinois or from points therein to ports of export. The Western District includes the western peninsula of Michigan, the State of Wisconsin, and all territory of all other states lying west of the Mississippi River. (Rec. 8).

The Commission's order was made in a proceeding known as *Rate Structure Investigation*, No. 17,000, an investigation instituted and carried on by the Commission in compliance with the direction of Congress contained in the Hoch-Smith Resolution, so-called, being Senate Joint Resolution 107, approved January 30, 1925, U. S. Code, Title 49, Sec. 55. The order instituting the investigation is set out in the record at page 45; the report of the Commission at page 69; and the order, which includes the report by reference, at page 273; and a supplemental report at page 275; and a supplemental amendatory order, which includes the supplemental report by reference, at page 324.

The *Rate Structure Investigation* was divided into several parts. That part in which the order here involved

was made, commonly herein after referred to as the grain rate case, was designated *Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and for Export.* With it were consolidated for hearing twelve other proceedings involving rates on grain and grain products in the Western District. (Rec. 57)

The Commission devoted 261 days to the hearing of that part of the general investigation relating to grain rates, receiving testimony covering 53,000 pages of transcript and 2100 exhibits. (Rec. 700) Finding rates in effect unreasonable, unduly preferential and prejudicial, it made an order prescribing reasonable maximum rate scales designed to remedy these defects. This order was made July 1, 1930, to become effective October 1, 1930. Upon the petition of the carriers, however, the effective date was from time to time postponed to June 1, 1931. (Rec. 280)

The carriers filed with the Commission two petitions for rehearing, the first on September 6, 1930, and the second on November 26, 1930. (Rec. 421, 507). These were both denied, the first on November 11, 1930, and the second on March 3, 1931. (Rec. 34, 39).

The appellant carriers thereupon brought an action in the United States District Court for the Northern District of Illinois to set the Commission's order aside, alleging that the same was void upon its face. A preliminary restraining order and an interlocutory injunction were asked for. (Rec. 5) Their application was set down for hearing at Chicago on May 6, 1931 before Hon. William M. Sparks, Circuit Judge, and Hon. Walter C. Lindley and Hon. Charles E. Woodward, District Judges. No part of the evidence before the Commission was before the Court. (Rec. 699-700).

A temporary restraining order was granted on May 7, 1931, for the period of 60 days (Rec. 658). On June 30, 1931, the court filed its findings of facts and conclusions of law (Rec. 686). On July 6, 1931, the Court filed its opinion, sustaining the validity of the Commission's or-

der (Rec. 698); and on July 7, 1931, orders were entered dissolving the temporary restraining order and denying the prayer for an interlocutory injunction (Rec. 708). Appeal was taken from those orders (Rec. 709).

ARGUMENT

The appellants have filed a very extensive brief. The argument therein contains 11 chapters, which are subdivided into subchapters and sections under 53 headings and subheadings. All that is said therein, however, is directed to the support of one or another of the propositions following:

1. That the order was based upon a misconception of the Commission's powers, which arose from a construction of the Hoch-Smith Resolution which had been condemned by the United States Supreme Court in *Ann Arbor Railroad Co. et al.* v. *United States et al.*, 281 U. S. 658.
2. That the Commission in making said order misconstrued Section 15a and disregarded its requirements.
3. That the Commission in reaching its decision in making said order considered matters outside the record, and
4. That the order is void because the Commission refused to set the same aside and reopen the proceeding in which the same was made upon petitions filed by the appellant's seeking such action.

SUMMARY OF POINTS

We shall make our reply to the appellant's brief by a discussion of these four contentions directed to the points following:

1. The Commission did not misconstrue the Hoch-Smith Resolution, nor use other standards than those prescribed by the Interstate Commerce Act.

2. The Commission did not misconstrue Section 15a, nor disregard its requirements.

3. The Commission did not consider matters outside the record.

4. The action of the Commission was not arbitrary.

1. THE COMMISSION DID NOT MISCONSTRUE THE HOCH-SMITH RESOLUTION, NOR USE OTHER STANDARDS THAN THOSE PRESCRIBED BY THE INTERSTATE COMMERCE ACT.

The Hoch-Smith Resolution (43 Stat. L. 801) is a law, made by Congress, directing the Interstate Commerce Commission as follows:

> "That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist."

This investigation was to be prosecuted expeditiously, and orders were expressly authorized to be made during its progress, as follows:

> "In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it

may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates."

The resolution gave directions respecting action upon rates applicable upon products of agriculture as follows:

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adquate transportation service."

This resolution had the same effect as an act of Congress, *Levey v. Stockslager*, 129 U. S. 470, *Fourteen Diamond Rings*, 183 U. S. 176, 184, *United States* v. *Chaney*, 228 U. S. 525, 531, Constitution of the United States, Article I, Section 7.

The Commission, soon after the enactment of the resolution, in compliance with the directions therein contained, instituted *Rate Structure Investigation*, No. 17,000. For the purpose of convenience this proceeding was divided into parts, in one of which the order involved in the instant case was made.

The fact, however, that the Commission saw fit thus to divide the investigation into parts, did not make the grain case, as one of those parts, an independent proceeding. The Commission was still under obligation to consider the same as a part of the whole comprehensive inquiry, ordered by the resolution, and carried on for the purpose of bringing all rates into proper relation to each other, and into conformity with the requirements of the Interstate Commerce Act. This is expressly admitted by the appellants in the sub-chapter numbered 2 beginning on page 79 of their brief.

We call attention to this fact not because we contend that the Hoch-Smith Resolution changed the standards to be applied by the Interstate Commerce Commission in determining the level at which rates applicable to any commodity should be prescribed, but because the fact that the proceeding was instituted and carried on for the purpose of complying with that resolution accounts for phraseology contained in the Commission's report, taken out of that resolution, to which appellants have in their brief sought to attach a wholly unwarranted significance.

(a) The Commission's First Construction of the Hoch-Smith Resolution.

The concluding paragraph of the Hoch-Smith Resolution was of uncertain meaning. On behalf of those urging the prescription of low rates on agricultural products it was contended that the resolution required the treatment of agricultural products as favored commodities, and the application to them of rates less than sufficient to yield a constitutional fair return upon the value of that portion of the carriers' property devoted to their transportation. The carriers, on the other hand, contended that the concluding paragraph of the resolution was not designed to prescribe a new rule for the determination of rates to be applied to agricultural products, but that it was intended to direct the Commission to proceed to the investigation of the rates applicable to such products "with the least practicable delay." The Commission appears to have adopted the first suggested construction. See *Ogden Grain Exchange* v. *Abilene & So. Ry. Co.*, 122 I. C. C. 691, 717 (decided March 15, 1927); *Ogden Grain Exchange* v. *Arizona Eastern R. R.*, 126 I. C. C. 255, 281 (decided May 10, 1927); *California Growers & Shippers League* v. *Southern Pacific et al.*, 129 I. C. C. 25 (decided July 20, 1927) commonly hereinafter referred to as the California Case; *Muller & Co.* v. *Pere Marquette R. R.*, 151 I. C. C. 787 (decided February 6, 1929); and *South Carolina Produce Assn.* v. *Aberdeen R. R. Co.*, 152 I. C. C. 5, 27 (decided February 14, 1929).

In the California case the Commission dealt with rates on deciduous fruits from California to the eastern part of the United States. It had previously in the same case (100 I. C. C. 79) held the rates assailed "not unreasonable or unduly prejudicial." Upon rehearing, however, considering the same in the light of the Hoch-Smith Resolution, the Commission found the rates unreasonable and required the same to be reduced.

That case came before this Court upon appeal in *Ann Arbor Railroad Co. et al.* v. *United States et al.*, 281 U. S. 658 hereinafter commonly referred to as the *Ann Arbor Case.* The court decided that the Commission had construed the resolution as requiring the Commission to make agricultural products most favored commodities, a construction which it held erroneous. Considering that the Commission's decision had been produced by this error of law, the order of the Commission was set aside. That decision of this court was rendered June 2, 1930. Since that date the Commission has conformed its decisions to the interpretation which the court's opinion placed upon the Hoch-Smith Resolution.

In the grain rate case the Commission specifically declared that in making the findings upon which the order was based it considered no standards other than those provided by the Interstate Commerce Act. The following is the declaration contained in the report at page 661:

> "The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*,——U. S.——, decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act."

(b) Grounds Upon Which Appellants Claim That the Court Should Conclude, Notwithstanding the Commission's Declaration to the Contrary, That the Order Was Produced by a Failure to Regard the Construction of the Hoch-Smith Resolution Given by This Court in the Ann Arbor Case.

The appellants, as we understand their brief, contend that the court, notwithstanding the Commission's declaration, from what the Commission said in its report and required by its order, should conclude that the Commission disregarded the construction which the court placed upon the Hoch-Smith Resolution in the Ann Arbor Case, and applied in the making of its findings and order in this case the same erroneous standard which vitiated its order in the Ann Arbor Case.

It is difficult to see how this conclusion can be reached without convicting all the members of the Interstate Commerce Commission of mis-stating what the Commission did, or, as the only other alternative, of being unable to understand what this court decided in the Ann Arbor Case. This last conclusion, however, appears not possible, for the reason that the effect of the court's decision was aptly and concisely stated in the very language we have quoted.

The appellants ask this Court to reach the conclusion that the Commission did actually disregard the Court's decision in the Ann Arbor Case upon consideration of the following facts, which appear from the face of the Commission's report and order:

(1) That the Commission finds to be unreasonable many rates which in cases previously decided (in some instances during the pendency of *Rate Structure Investigation*, No. 17,000) the Commission either approved or prescribed.

(2) That the Commission's report in the grain case does not contain findings and discussion, as to the cost of the grain rate service, and the value thereof and as to the relation of the rates on grain and grain products to the rates on other commodities and classes of traffic.

(3) That in its "General Comment", in the grain rate report, the Commission used phrases taken from the Hoch-Smith Resolution.

(4) That the order will effect a substantial reduction in the general level of the rates dealt with, notwithstanding it appears from the report that the carriers were not receiving the fair return contemplated by Section 15a.

(5) That certain individual Commissioners, in separate concurring reports, expressed doubt as to whether the rates prescribed were sufficiently high.

(6) That Commissioner Eastman in his concurring report, in discussing the Hoch-Smith Resolution, said that the resolution made it the duty of the Commission to prescribe "the lowest possible lawful rates compatible with an adequate transportation service", and argued that the Court had misconstrued the Commission's construction of the Hoch-Smith Resolution in the Ann Arbor Case.

(7) That only 30 days intervened after the decision of this Court in the Ann Arbor case before the Commission decided the grain rate case.

These several grounds for the conclusion urged upon the court we will discuss in their order.

(1) That the Commission finds to be unreasonable many rates which in cases previously decided (in some instances during the pendency of Rate Structure Investigation, No. 17,000) the Commission either approved or prescribed.

We submit that the Court can not base a conclusion that the Commission has misconceived the law upon the fact that the Commission has changed rates which, upon other evidence in other proceedings, it approved or prescribed.

Findings as to the reasonableness of rates made in one case do not become res adjudicata. This has long been recognized. A rate-making body could not meet changing conditions upon any other principle. It has always

been recognized; and was lately very clearly expressed by this Court in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445.

Whenever the Commission is called upon to determine the level at which rates for the future should be maintained, in order that they may not be unreasonable or unduly preferential or prejudicial, it must make that determination upon the facts then appearing. The determination rests upon administrative findings made upon evidence upon which it is peculiarly qualified to pass, and, if there be substantial evidence, such findings are not subject to judicial review. An order so based may be set aside only for error of law, and a conclusion that the Commission has erred must rest upon some other foundation than that the Commission's findings are inconsistent with findings made by it in other cases.

The reason why no conclusion that the Commission has misconceived the law may rest upon apparent inconsistencies of findings made in different cases is obvious. Each such finding is an administrative finding based upon evidence. It is impossible to say that a finding in one case that a rate is unreasonable which has before in another case been found reasonable, has been induced by a changed conception of the law. Even a guess upon that could be made only upon an examination and consideration of the evidence upon which the Commission based its different findings. But these are findings which are beyond review by the court.

Whether changes in the rates on grain and grain products which were approved in any prior case by the Commission are now necessary to place those rates upon a just, reasonable and non-discriminatory basis for the future is in each case a question of fact, which was for the decision of the Commission in the grain case. The decision rested upon the evidence in the record, which is not before the Court. In the absence of the evidence the petitioners admit that it must be deemed sufficient. It necessarily follows, therefore, that whatever changes in rates previously approved or prescribed by the Commission will be required by the order every such change was

made upon sufficient evidence that the existing rates do not conform to the standards prescribed by the Interstate Commerce Act; and such changes can afford no basis whatsoever for a conclusion that the Commission was moved to make them by a misconception of the Hoch-Smith Resolution or of Section 15a or of any other provision of law.

The Decision of the Commission in Earlier Cases Supports Its Decision in the Grain Case.

Examination of the reports of the Commission in which were involved rates which are dealt with in the order in the grain case will show that the order was made, as the Commission has stated in its report, under the provisions of the Interstate Commerce Act. In other words, such examination will make it clear that the order was not only consistent with former decisions, but was necessary to bring such rates into conformity with the standards prescribed by Sections 1 and 3 of that Act. We cite some of these cases, and comment upon them briefly.

Increased Rates, 1920, 58 I. C. C. 220, decided July 29, 1920, commonly referred to as *Ex Parte 74.* In this case all freight rates in the Western Group were increased 35 per cent; all those within the Mountain Pacific group 25 per cent, and all those between the groups by 33 1/3 per cent.

Rates on Grain, Grain Products and Hay, 64 I. C. C. 85, decided October 20, 1921. In this case the Commission ordered rates on grain and grain products reduced by the removal of one-half of the increases authorized by *Increased Rates, 1920,* and ordered that the rates on coarse grains should be further reduced to 90 per cent of the reduced rates on wheat. The Commission also found that the rates on grain and grain products *were disproportionately high.* At page 96 of its report the Commission said:

"The facts disclosed in the record make it appear that grain and grain products and hay, on the whole, are bearing a share of transportation charges which is disproportionate."

It was upon this finding, and upon the construction of Section 15a indicated, that the Commission required rates on grain and grain products to be reduced, as before stated. This was in 1921.

The Discriminatory Relationship of Grain Rates as Between Themselves Recognized.

The discriminatory character of many of the grain rates, as compared with other grain rates, became apparent to members of the Commission in the course of its investigation in the case last cited. Commissioner Lewis, in his concurring report (in which he was joined by Commissioner Hall) at page 105, said:

"The record in this case reveals that horizontal percentage increases in rates on grain, grain products, and hay, made necessary by the emergency conditions under which the Commission acted in Ex Parte 74, have greatly widened the spread between producers who are near and those who are far distant from markets. *** We recognized similar conditions in *National Live Stock Shippers' League* v. *A., T. & S. F. Ry. Co.*, supra, and sought to place the far-distant producer on a more favorable basis. Our finding in that case applies with equal force here. The exaggerated spread between the long and short haul rates, under the conditions that face us, will be unjust and unreasonable and, in my opinion, the rate reduction should be so applied as to tend to restore better relationships between producers, as was done in the case cited."

Reduced Rates, 1922, 68 I. C. C. 676, decided May 16, 1922. In this case it appeared that the carriers were still far from receipt of the 15a return. Notwithstanding this failure the Commission found all freight rates in the Western District which had not, subsequently to the *Ex Parte 74* advances, received reductions of 10 per cent, to be unjust and unreasonable, and required a horizontal reduction of 10 per cent in such rates.

This reduction was not extended to the rates on grain and grain products. It accordingly operated in very substantial degree to bring into effect again the discriminatory rate relationship which in Rates on Grain, Grain Products and Hay, in the preceding year, had been found to place upon the commodities there dealt with a disproportionate share of the rate burden.

Kansas Public Utilities Commission v. *A. T. & S. F. Ry. et al*, 83 I. C. C. 105, decided October 11, 1923. This was a proceeding instituted by the Kansas Commission to secure a further reduction in the rates on grain and grain products which should remove the disproportionate share of the rate burden resting on those commodities. The Commission held that the record was insufficient for decision. A further hearing was, accordingly, ordered, "without indicating views as to the final disposition of the matter."

Rates and Charges on Grain and Grain Products and Kansas Public Utilities Commission v. *A. T. & S. F. Ry. et al.*, 91 I. C. C. 105, decided July 10, 1924. This decision disposed of the complaint of the Kansas Commission, dealt with in the earlier case, and of an investigation of rates on grain and grain products throughout the Western District which had been instituted by the Commission. Both proceedings were dismissed.

Five of the eleven Commissioners dissented. The reasons which they gave for their dissents are significant.

Commissioner Campbell, after comparing the earnings on grain and grain products with the earnings on other classes of traffic, said:

"I think they should be reduced so as to relieve the complaining shippers of the full amount of the 1920 increases. **** An increase of less than 2 per cent in the rates on other commodities would more than make up this reduction. *** *If the multitude of so-called depressed rates now maintained by the carriers which do not bear their fair share of the transportation burden were increased to a reasonable level and the uneconomic, inefficient, and wasteful transportation under such rates, particularly over unduly circuitous routes,* were stopped, the resulting additional revenue to the carriers would equal many times the reduction contemplated in this dissent." (Italics ours.)

Commissioners McChord and McManamy concurred in the views expressed by Commissioner Campbell, and declared "that the reductions which should be made in this case should (not) in any way be conditioned upon contemporaneous offsetting increases in rates on other traffic."

Commissioner Lewis said:

"The present record affords proof that the existing rates on grain and grain products, but not hay, are unreasonable in the western and eastern districts, and on this showing I favor the removal of the remainder of the *Ex Parte 74* increases in the West, and a 10 per cent reduction in the East, the latter covering the principal movements from western producing points to the great eastern consuming regions and to the various ports for export."

Commissioner Eastman said:

"These rates can not lawfully be reduced, however, unless they are now unreasonable. *** The test must, I think, be the preponderance of the evidence, weighing it in the scales of judgment in the way to which we have been forced by the lack of

scientific principles of rate making. It is undoubtedly a close question, but I believe that *the conclusion is warranted that the rates on grain and grain products in western territory are unreasonable;* and in this opinion I am influenced chiefly by the fact that *this traffic, more particularly wheat, now seems to be bearing more than its fair share of freight charges,* taking into consideration the volume of movement, the leading and other transportation characteristics, and the trend of relative values in recent years. (Italics ours.)

"The majority have, I feel, given insufficient weight in their comparisons of car-mile and ton-mile earnings to the principle, generally accepted in rate making, that such earnings should decrease as the length of haul increases. Not only is the average haul materially greater on grain and grain products than in the case of all carload traffic, a disparity which is increased if products of agriculture are excluded from the latter total, but as a matter of fact the average car-mile and ton-mile earnings for the total are swollen by the fact that the average hauls on such low-grade commodities as sand and gravel and iron ore are comparatively short. This is merely an indication of the great care which must be exercised when such comparisons are employed. When proper allowances are made, it seems to me that they support the conclusion that the rates on grain and grain products are unreasonable."

The majority made a summary statement of reasons for the decision in part as follows:

"The present rate structure is largely the result of commercial and transportation conditions, and under it the trade and commerce of the country have grown up. Any material disturbance therein will have a tendency to cause disruption of business conditions generally to the detriment of an orderly con-

duct of commerce and with possibly serious effects upon large sums of invested capital and upon the steady employment of labor. Any marked readjustment might mean the moving of industries from points now near the source of supply of raw materials to points farther distant. *A revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal.* *** *It is not enough that the present conditions may not be ideal; it must appear that something better is attainable.*" (Italics ours.)

Those who composed the majority when the decision was made were Commissioners Meyer, Aitchison, Hall, Potter, Esch and Cox, two only of whom remain upon the Commission. Of the five who dissented, three remain in office. It may accordingly be noted parenthetically that the decision in the grain case accords exactly with the decision made in 1924 by the majority of the Commissioners then in office who remain in office.

It will be noted that five of the eleven Commissioners then found that the rates on grain and grain products were disproportionate and unreasonable and should be immediately reduced, and that the majority justified their contrary finding by indicating that while the present rate structure might not be ideal, nothing better appeared attainable at the time, because, as they said, "a revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal."

Grain and Grain Products From, To, and Between Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin Points, 122 I.-C. C. 235, commonly referred to as the Northwestern Grain Rate Case, decided February 8, 1927. It will be noted that this decision was rendered shortly before the decision in the California deciduous fruit rate case, which was pending at the same time. The discussion contained in the report indicates the same understanding of the effect of the Hoch-Smith Resolution which is indicated by the Commission's decision in that case.

The case involved increases in rates which the carriers proposed to make for the movement of wheat from a large area in the Northwest. *Those rates which the carriers sought to increase were the lowest rates in the Western District.* The Commission, however, refused to permit them to be increased, for the reasons stated in its report, at page 265, as follows:

> "As has been seen, the carriers' attempted justification of the suspended rates depends primarily and chiefly upon rate comparisons. Considering this showing alone, they have made out a strong case. The comparisons are very numerous, cover a wide range, and included many rates which we ourselves have fixed. They warrant the conclusion that, judged by other rates from the grain fields of the western territory to primary markets, the present rates on grain and grain products from North Dakota and Minnesota points to Minneapolis and Duluth are in general low, and that the proposed rates are in general not unduly high. There is less evidence as to the rates which move these commodities out of the primary markets, and there seems some reason to believe that certain of these latter rates, which are more subject to competitive influences, are relatively much lower than the initial rates to these markets.
>
> "It is significant, however, that the carriers' case practically ends with this showing. *** *No evidence was offered by the carriers, such as they frequently present in rate cases, with a view to showing that the earnings of the rates which they are seeking to increase are either intrinsically low, or low by comparison with the earnings derived from the rates on other commodities. No attempt was made to show the actual or the relative cost of service.* ***

"On the other hand, the evidence as to relative earnings and cost of service, which was presented by the North Dakota complainants, while not free from defects and susceptible to criticism, does clearly warrant the conclusions that the present rates of the respondents' carriers on grain products are by no means unremunerative rates, and that they yield earnings which compare quite favorably with the earnings which these carriers derive from the rates on many other forms of traffic and with the earnings which other carriers in the western group derive not only from other commodities but from grain and grain products as well.

"Upon this record we must and do find that the respondent carriers have not sustained the burden of justifying the proposed increase in rates. ***

The Hoch-Smith resolution has brought to the forefront the question of the *distribution among commodities of the transportation burden*, thus emphasizing the need for considering *the relative costs of service*, and *the relative earnings of the various kinds of freight traffic*, difficult as this task may be. ***

"It is evident, especially in the light of the Hoch-Smith resolution, that the rate structure in the northwestern and western trunk-line regions requires an analysis and investigation of a more thorough and fundamental character than it has yet received. *It is also clear from the record in this case that the rates on grain and grain products, particularly to the primary markets, are deserving of a consideration, from the standpoint of relative earnings and fair share of the transportation burden, which perhaps has not hitherto been sufficiently given them.* We have pending No. 17000, Part 7, *Grain and Grain Products within Western District*, hereinafter called the general investigation, which embraces the rates on grain and grain products in the entire western

district and from that district to the ports of the country for export. That proceeding will afford the opportunity for such consideration." (Italics ours)

Ogden Grain Exchange v. *Abilene & Southern Ry. Co., 122 I. C. C. 691, decided March 15, 1927, and Ogden Grain Exchange* v. *Arizona Eastern R. R. et al.*, 126 I. C. C. 255, decided May 10, 1927. These are the cases which are cited upon page 63 of appellants' brief, involving rates from Idaho and adjoining states to other parts of the United States. The Commission's reports in both of these cases contain reservations to the effect that the rates therein prescribed would be subject to further revision in the general investigation, the Commission saying in each case:

> "We shall leave for determination in the pending general investigation the question whether any of these rates are the lowest possible rates compatible with adequate transportation service."

It would seem apparent upon consideration of the Commission's reports in these several cases decided in 1927 that the Commission at the time they were severally decided entertained the conception of the effect of the Hoch-Smith Resolution which it commented upon in the California deciduous fruit rate case. It is further clear that the Commission decided each of said cases upon its own record, regarding rates therein prescribed or approved as temporary in nature, subject to final approval or revision upon the completion of the general grain rate case, covering the entire Western District.

From time to time during the pendency of the *Rate Structure Investigation*, No. 17,000, the Commission in various other cases likewise prescribed or approved rates which are now dealt with in the order made in the general grain rate case.

It was not until the completion of the general case that the Commission was able to take a broad survey of rates

on grain and grain products throughout the Western District, and to consider the rates in each locality or territory in comparison with the rates to and from every other locality and territory, and in the light of comparisons with rates on other commodities and evidence as to the comparative costs of moving grain and grain products and such other commodities, and in the light of all evidence necessary to a determination of the just and reasonable rates which should be applied upon a revision of the entire rate structure. When it was able to make that survey and thus to consider all existing rates applicable to grain and grain products, it was confirmed in the finding which it had first made in 1921, to the effect that grain and grain products were bearing a disproportionate share of the rate burden.

This was the conclusion which five of the eleven Commissioners had reached also in *Rates and Charges on Grain and Grain Products in 1924.* It was the conclusion which was indicated by the decision of all of the Commissioners in the *Northwestern Grain Rate Case in 1927.*

Furthermore, discriminations in the grain rates themselves against certain localities and in favor of others, upon which Commissioners Lewis and Hall had commented in 1921, were found to exist in a striking degree.

The grossly discriminatory character of the grain rate structure is illustrated by the comparison of rates set out on pages 658 and 659 of the Commission's report, (Rec. 108-109) from which it appears that some localities were paying rates more than two and one-half times as great as other localities. The Commission found that many of these discriminatory rates were among those which had been approved or prescribed by it. Under these circumstances the Commission's finding was expressed as follows:

> "We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others

are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others."

Not only does this review of cases in which the Commission has dealt with grain rates in the Western District disclose nothing which compels the conclusion that the Commission must have obstinately or stupidly persisted in a misconstruction of the effect of the Hoch-Smith Resolution, which was condemned by this Court in the Ann Arbor Railroad Case, and that the order which is in this suit sought to be set aside was produced by that misconstruction, but *on the contrary, it leads to the conclusion that the Commission accepted and followed the construction which had been placed upon the resolution by the court, and fixed the rates which the order prescribes upon lower levels than it would have fixed them under the construction which the Commission itself had formerly placed upon the resolution.*

This appears from the following. In the *Northwestern Grain Rate Case*, 122 I. C. C. 235, as we have seen, the Commission had before it the lowest body of rates in the Western District. They were lower than the rates in other sections, and lower than rates which the Commission had itself prescribed, yet the Commission refused to permit those rates to be advanced.

This refusal was based upon evidence as to the cost of service which was before the Commission in that case. The Commission, in language which has been quoted in this brief, indicated that the rates before it were entitled to a consideration they had not before received, upon the basis of relative earnings and a fair share of the transportation burden, and gave notice that a redistribution of the rate burden would be made in the general grain rate case.

The Commission's conclusion that the rates proposed were not justified was upon the record as it then stood "*in the light of the Hoch-Smith resolution.*" At the

conclusion of the general grain rate case the carriers had made no attempt to meet the evidence as to cost of service which was before the Commission in the *Northwestern Grain Rate Case.* That record had been consolidated with the record in the general grain rate case, and the evidence as to cost of service presented by protestants at the first hearing had been substantially strengthened by further evidence produced by the experts of the Interstate Commerce Commission and of the state commissions. Commissioner Eastman, in his concurring report, quoted what had been said in the Commission's report in the Northwestern Grain Rate Case, and commented upon the significant failure of carriers to introduce any evidence as to cost of service, as follows:

"This was notice that in this general investigation we would wish to obtain all the information possible in regard to the cost of transporting grain and grain products. Several of the State commissions responded to this suggestion and at considerable trouble and expense prepared and submitted cost studies that were more or less comprehensive. Statistics and studies were also presented by our Bureau of Statistics. The carriers, however, refrained from offering any direct evidence in regard to costs and contented themselves with rebuttal evidence of fragmentary character in criticism of the studies made by others. It is their position that it is not practicable to ascertain the cost of hauling grain and grain products. Yet this has not been their position with respect to other forms of traffic, in contesting the orders of State commissions on the ground of confiscation. In *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, at page 590, where lignite rates prescribed by the State were found to be confiscatory, the following was quoted from the opinion of the State court:

'As a result of the painstaking work of the accounting department of this railway company, and

its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the State, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity."

"The State court made a finding in dollars and cents of the amount of expense chargeable to the traffic in question, and this finding was sustained by the Supreme Court. See also *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, and *Boyle* v. *St. Louis-San Francisco R. R.*, 222 Fed. 539.

"Under the accounting and statistical systems now maintained by the carriers it is difficult to arrive at a wholly satisfactory approximation of the cost of handling any particular form of traffic, without a very elaborate and costly special study based on checks and observations extending over a comparatively long period of time and having for their purpose the accumulation of data which are not recorded as a matter of normal routine. However, although no such special study has here been made in any comprehensive way, *there is considerable evidence of record bearing on costs, and by the reasonable exercise of informed judgment it is possible, I believe, to arrive at conclusions with respect to the average costs of transporting grain and grain products in the western district which will not be arbitrary but within reasonable limits of accuracy.* *** (Italics ours.)

"Returning to the question of transportation cost, the basic evidence upon this question is that furnished by our Bureau of Statistics. It will be well, I think, to describe this evidence a little more fully

than is done in the main report. The object was to arrive from the statistics of Class I railways at a reasonable approximation of the cost of transporting grain in the western district. *** Return on book value was figured on a 4 per cent and also on a 6 per cent basis, producing alternative final total unit costs. With these data total costs per 100 pounds of transporting each of the general classes of grain and grain products for 200,.300, 400, and 500 miles were determined, thus furnishing the rudiments of a scale.

"This is stating the process followed by the bureau, of course, very briefly and baldly. *It was supported by testimony of the director of the bureau, giving in detail, as the result of his years of experience, observation, and study, the reasons for what was done, including any assumptions that might on their face seem arbitrary.*

"The result may be checked by the criticisms of the State Commissions, backed in some instance by very elaborate special studies of their own, and by criticisms of the carriers." (Italics ours)

It therefore appears that when the report in the general grain rate case was made the evidence to sustain the reasonableness of the rates then in effect in the Northwest was much more complete than when in the *Northwestern Grain Rate Case* the Commission had refused to permit those rates to be advanced. Nevertheless the Commission's order resulted in substantially increasing a very large part of those rates.

The conclusion to be drawn seems obvious. The Commission has prescribed rates, as it asserts in its report, according to the standard of Interstate Commerce Act instead of according to the standard which it previously conceived to have been established by the Hoch-Smith Resolution. *The result is a substantial advance in rates in the Northwest, and substantially higher levels of rates throughout the Western District, than we should have had but for the decision of the United States Supreme Court in the Ann Arbor Railroad Case.*

(2) That the Commission's Report in the Grain Rate Case Does Not Contain Findings and Discussion as to the Cost of the Grain Rate Service and the Value Thereof and as to the Relation of the Rates on Grain and Grain Products to the Rates on Other Commodities and Classes of Traffic.

It is singular that the appellants should venture to attack the Commission's order on this ground, in view of the comment which was made in the *Northwestern Grain Case* (122 I. C. C. 235) upon their failure to present evidence which would enable such findings in that case, and the clear notice which was given them in the report in that case that they should present such evidence in No. 17,000, and in view of their complete failure to offer such evidence, after such notice. This failure is commented upon in Commissioner Eastman's concurring report in the grain case (Rec. 170), which we have quoted from in this brief.

If the appellants saw fit to refrain from offering evidence on these several matters, as it appears they did, they are scarcely in a position to complain because findings were not made.

The appellants, however, do not claim that they were not given full opportunity to produce whatever evidence they sought to produce touching these matters. They point to the absence of findings thereon, asserting that it is persuasive evidence that the Commission considered itself under no obligation to apply established standards of rate-making when dealing with rates on products of agriculture. The fact that the particular findings and comparisons mentioned were not made in the grain case, however, is not open to any such construction.

While the original Act to Regulate Commerce required findings by the Commission to which was given the effect of prima facie evidence, the Hepburn Act in 1906 so amended Section 14 "as to dispense with the necessity of formal findings of fact except in cases where reparation or damages are involved." *Manufacturers Ry. Co.* v.

United States, 246 U. S. 489; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 667.

Sometimes the Commission in a rate case includes findings as to comparative rates and costs, and data bearing on the value of transportation of the particular traffic moved,—and sometimes it does not. To argue that because the Commission did not make these findings and comparisons in the grain rate case the Commission evidently considered grain rates, under the provision as to lowest possible lawful rates in the Hoch-Smith Resolution, free from determination by the usual Interstate Commerce Commission standards, is altogether fanciful. There is perhaps no better demonstration of this fact than to point to the Commission's decision in *Rate Structure Investigation No. 17,000, Part 5, Furniture*, 177 I. C. C. 5. In that case there is a complete absence of findings as to cost of service and value of service and findings and comparisons as to the levels of furniture rates and rates on other commodities. If such absence of findings and comparisons has the significance claimed by the appellants, then it must be assumed that the Commission, at the time it fixed rates on furniture, believed that it was dealing with products of agriculture.

(3) That in its "General Comment" in the Grain Rate Report the Commission Used Phrases from the Hoch-Smith Resolution.

We have already pointed out that the grain rate proceeding was a part of the general investigation which the Hoch-Smith Resolution directed. This Court in the Ann Arbor Case did not hold that the Hoch-Smith Resolution was unconstitutional or without effect. Furthermore, this Court did not hold that the last paragraph of the resolution was invalid. It simply ruled that the direction contained in the paragraph "must be held to work no substantial change in the meaning or operation of Secs. 1(5) 3(1), and 15 par. (1) of the existing law."

The words directing the Commission "with the least practicable delay" to effect lawful changes in the rate structure of the country which should cause the products of agriculture to move "at the lowest possible lawful rates" were given judicial construction which left them valid law.

The resolution continued the duty of the Commission to proceed with the rate investigation and revision directed by the Congress, but to establish rates only on levels determined by the application of standards found in the Interstate Commerce Act. Rates on products of agriculture fixed by such standards, according to the judgment of the Commission, upon a just and reasonable basis, are "the lowest possible lawful rates." The Hoch-Smith Resolution was thus continued in effect, in all its parts, as so construed by this Court. Any phrases out of the same used by the Commission, or by any Commissioner, in the grain rate case, will be deemed to have been used in the proper sense which was given to the same by this Court in the Ann Arbor Case.

Because the Commission was executing a command laid upon it by the Congress in the Hoch-Smith Resolution, and because the resolution directed that the rates established should be "compatible with the maintenance of an adequate transportation service," it was appropriate and desirable that the Commission in its report should include the finding,—which the appellants strangely have so much emphasized and relied upon,—that the readjustments ordered "will not threaten the maintenance of an adequate system of transportation."

For the same reason, if the Commission in its report (as it did not) had denominated the rates which it prescribed "the lowest possible lawful rates" that phrase would have been construed in the sense given to it by this Court, and the validity of the order would have been in no wise affected.

(4) That the Order Will Effect a Substantial Reduction in the General Level of Rates Dealt with, Notwithstanding It Appears from the Report That the Carriers Were Not Receiving the Fair Return Contemplated By Sec. 15a.

The fact that reductions are required by the order when the carriers are not receiving the Sec. 15a return does not show that the Commission used unlawful standards in determining the level of the rates to be established. The evidence upon which the Commission acted is not before the Court; but it is conclusively presumed sufficient to support the Commission's finding that such rates were unreasonable to the extent that they exceeded the prescribed level. *Louisana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Chicago & Long Island Ry. Co.* v. *United States*, 270 U. S. 287, 295; *United States* v. *Tennessee*, 262 U. S. 318, 324.

We have already seen that rates on grain and grain products were found disproportionately high in *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, in 1921, and reduced 10 percent, and that thereafter, in consequence of a reduction in other rates following *Reduced Rates, 1922*, 68 I. C. C. 676, this discriminatory relationship was restored: and we have also seen in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105, decided in 1924, five of the eleven Commissioners then sitting favored a reduction at that time, and that the discriminatory relationship between rates on grain and grain products and other rates was then recognized.

The appellants admit that if the rates are above the bounds of reasonableness the Commission may reduce them, notwithstanding the carriers are not receiving the Sec. 15a return (Appellants' Brief, page 101). The Commission did so find.

(5) That Certain Individual Commissioners, In Concurring Reports, Expressed Doubt As to Whether the Rates Prescribed Were Sufficiently High.

(6) That Commissioner Eastman, In His Concurring Report, in Discussing the Hoch-Smith Resolution, Said That the Resolution Made It the Duty of the Commission to Prescribe "The Lowest Possible Lawful Rates Compatible With an Adequate Transportation Service"; and Argued That the Court Had Misconstrued the Commission's Construction of the Hoch-Smith Resolution in the Ann Arbor Case.

These separate utterances of Commissioners call for short comment. There is nothing in any of the concurring reports in any way inconsistent with what is said in the majority report. But if there were, an opinion of the majority can not be invalidated by what some concurring Commissioner may see fit to say in a separate report. If it could be thus invalidated, an effective method would be open to any dissenting Commissioner to control the action of the majority.

The appellants, at page 104 of their brief, cite two cases as authority for their contention that the Court may determine the basis of the Commission's action from concurring or dissenting utterances of the minority. The cases cited, however, do not support the contention. We examine these briefly.

In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, the Court was dealing with an order of the Commission made in *Western Oregon Lumbermen Manufacturers' Assn. et al* v. *Southern Pacific Co.*, 14 I. C. C. 61. The Court's conclusion that the order was produced by an erroneous construction of law was based not upon utterances in a dissenting report, but upon the language of Commissioner Prouty in the majority report, which abundantly supported, if it did not compel, the conclusion. The Court was construing *the language of the majority report* in the light of surrounding circumstances.

The order was set aside because the Court concluded that it rested "on the belief by the Commission that it had the right, under the law, to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate."

With reference to the dissenting report, the opinion of the Court in full was as follows:

> "Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

In other words, the language of the majority report, as the Court will see upon examining the same, plainly indicated that the Commission was attempting to exercise the power mentioned, and the dissenting Commissioners had dissented on the ground that no such power was vested in the Commission.

The Court also pointed out that the syllabus of the Commission's report asserted that the damage to the lumber interests which would result from the proposed rate changes "is an important consideration in passing upon the reasonableness of such advance."

St. Louis & O'Fallon Ry. Co. v. *United States*, 279 U. S. 461, is a case in which the Court dealt with a recapture order made by the Interstate Commerce Commission in *Excess Income of St. Louis & O'Fallon Railway Company*, 124 I. C. C. 3. In that case also the conclusion of the Court that the order of the Commission was produced by an error of law rested *upon the language of the majority report* construed in the light of the dissenting and concurring reports. The question was whether the Commission had given consideration to reproduction cost, in

reaching its conclusion as to the value of the plaintiff's property. Most of the very extended report of the majority was devoted to an argument to show why no consideration should be given to that element. The method which the Commission had followed in the determination of the value reported was described at great length. It necessarily excluded any consideration of reproduction cost as for the years for which the values reported were found, as this Court will perceive upon an examination of the report.

The reference to dissenting and concurring reports in the opinion of the Court was as follows:

> "Four dissenting Commissioners declare that reproduction costs were not considered; *and the report itself confirms their view.* Two of the majority avow a like understanding of the course pursued.
>
> "The following from the dissenting opinion of Commissioner Hall, concurred in by three others, accurately describes the action of the Commission:—" (Italics Ours)

An examination of the majority and dissenting reports will show that the statement of Commissioner Hall was merely a condensation of a more extended statement contained in the majority report which the Court adopted for conveniently setting forth in the opinion the action of the Commission which was held not in accordance with law.

Neither of these opinions is authority for the consideration of language in a report of a dissenting or concurring minority of the Commission for the purpose of negativing a perfectly unambiguous statement in the report of the majority, or even for the purpose of reaching a conclusion that findings and an order to support which there was evidence before the Commission were produced by an error of law which is not indicated by any discussion whatever in the majority report.

A majority of the Commission may say in a report that the Court erroneously misconstrued and set aside

former report of the Commission without thereby invalidating an order of the Commission which rests upon the second report. This will appear very clearly from a perusal of the reports and opinions in the so-called lemon rate case, *Arlington Heights Fruit Exchange* v. *Southern Pacific Co.*, 19 I. C. C. 153, 22 I. C. C. 149; *A. T. & S. F. Ry.* v. *United States*, 190 Fed. 591, 203 Fed. 56, 231 U. S. 736.)

(7) That Only 30 Days Intervened after the Decision of This Court in the Ann Arbor Case Before the Decision of the Commission in the Grain Rate Case.

Comment is made upon the fact that but 30 days elapsed between the decision of this Court in the Ann Arbor Case and the decision of the Commission in the grain case. In their brief below appellants said:

> "It would have been literally impossible for the Commission in the 30 days intervening between the decision of the Supreme Court and the entry of its order to have reviewed the record (consisting of 53,000 pages of transcript and 2,000 exhibits) in the light of that decision.
>
> "It would have been impossible within this thirty-day period for the Commission maturely to have reconsidered its determination of the 'three score and more major issues' and to reach new conclusions thereon in harmony with such decision."

At page 144 of their brief filed in this Court appellants say:

> "At the time of its decision (the Ann Arbor Case) this case had been under review by the Commission, after submission, for a period of eleven months (R. 69). The final report was in course of preparation as early as November 1929, seven months prior to the decision of the Court (R. 21). The record consisted of over 53,000 pages of transcript and more

than 2,000 exhibits (R. 147). More than three scores of major issues were involved (R. 147). It is not surprising if the Commission, including Mr. Eastman, within the thirty days available, failed to perceive the full import of the Court's decision and to reexamine this enormous record in the light thereof, but by reason of such failure of perception perpetuated in part, if not in whole, the error under which it had therefore conducted and considered the case."

We submit that there was no occasion to review the 53,000 pages of transcript and the 2,000 exhibits. In view of the facts commented upon by appellants,—that at the time the Ann Arbor Case was decided the Commission had held the case under consideration after submission for eleven months, and for seven months after its report was in course of preparation,—the conclusion is obvious that the Commission, at the completion of its study of the evidence in the grain rate case, was awaiting the decision of this Court in the Ann Arbor Case for guidance in making its order in the grain case.

We do not consider it necessary to argue that the period of one month is quite sufficient to enable Mr. Eastman and his associates to perceive the full import of the decision which the Court rendered in that case. So far as any revision of the Commission's order made necessary by the decision is concerned, it would not be time-consuming. All the Commission needed to do was to determine the percentage by which rate scales determined upon should be varied to bring the rates up to the standard of reasonableness required by Section 1 of the Interstate Commerce Act. Beyond that the task was simply a mathematical problem, which could be accomplished by subordinates in a few days' time. The ease with which rate changes could be effected, once the rate scales contemplated in the report were determined upon, was commented upon by Commissioner Woodlock in his concurring report at page 737 (Rec. 187).

In the court below counsel for the appellants stated that all that was necessary to meet their complaint presented by this action was to increase the prescribed rate scales by 13 percent. Whatever the percentage which may have been involved, it is obvious that any change which was made necessary by the Court's decision was a no less simple matter.

2. THE COMMISSION DID NOT MISCONSTRUE SECTION 15a, NOR DISREGARD ITS REQUIREMENTS.

The appellants' claim with respect to the proper application of Section 15a is not altogether easy to understand. Various rather voluminous sections of their brief are devoted to attempted support of their claim that the Commission misconstrued Section 15a, and failed to give proper effect thereto, but nowhere can be found a clear and concise statement of their claim either as to what Section 15a requires the Commission to do, or as to what the Commission did or failed to do in violation of such requirement.

Endeavoring to ascertain what their claim is in order that it may be discussed, we abstract the following. At pages 87, 90 and 92 of their brief the appellants say:

> "(A) Sections 1, 5 and 15a must be read together. Section 15a qualifies and controls the powers which may be exercised under Sections 1 and 15 in any case, where the Commission is required to give the former consideration. ***
>
> "This section (15a) casts an affirmative duty upon the Commission. It requires that it 'shall' so establish or adjust rates as to accomplish the purpose stated. This duty it is to perform 'in the exercise of its power to prescribe just and reasonable rates' (i. e., in the exercise of the powers conferred by Sections 1 and 15). The three sections are thus linked together, and the standard created by Sec. 15a must be read into and becomes a part of the standard

created by Sec. 1. In any case in which the Commission is required to give effect to Sec. 15a, that section, in addition to casting an affirmative duty upon the Commission, limits the powers which it might otherwise have exercised under Sec. 1, ***

"Moreover, prior to the enactment of Section 15a, there was no standard whereby the adequacy of the revenues of the carriers as a whole, or in any given section of the country, was required to be measured. Theoretically, any railroad was protected against the imposition by public authority of rates, the general level of which, or which taken as a whole, failed to produce a fair return upon the value of its property. As a practical proposition, it could not obtain relief therefrom, however, unless the competing railroads in its own section were in a position to make the same showing. *** There was, therefore, no legal standard for the measurement of the adequacy of the railroad revenues as a whole.

"Congress by Section 15a provided such a standard. In so doing it provided for application to the revenues of the railroads, as a whole, the rule of the Fifth and Fourteenth Amendments as applied to the rates of a single public utility. ***

"The purpose and effect of Section 15a was, therefore, to substitute for the old system of regulation, under which the railroads, as a whole, were permitted to earn a fair return out of the aggregate of separately established rates, if sufficiently high for the purpose, a new rule of rate-making designed to insure such a return and to impose upon the Commission the affirmative duty so to adjust rates as to accomplish such result.

"Although the purpose was to provide for the maintenance of an adequate transportation system, Congress did not leave to the determination of the Commission either the standard by which the attainment of this object was to be achieved, or the measure of its attainment. It itself provided the standard by requiring that the rates should be such as to pro-

vide, as nearly as might be, a fair return upon the aggregate value of railway property, and the means of its realization by directing the Commission so to adjust the rates. ***

"It follows

(1) That Sec. 15a *** imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be;

(2) That the rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of structure is sufficient for maintenance of an adequate system of transportation."

From the foregoing, if not negatived by any other portion of their brief, we should understand the appellants to claim that Section 15a in effect amended Sections 1 and 15 so that now the Commission's power is limited to the extent that it may no longer reduce rates which it finds to be unreasonable unless the Section 15a return is being earned; that whereas it was formerly the Commission's duty to exercise its judgment, and to establish rates upon a level found by it to be just and reasonable, in view of all evidence relative to the question of reasonableness, it is now the Commission's duty to denominate rates "just and reasonable" which will produce the Section 15a return, and to establish those rates;—in short, that Congress by the statute has displaced the old standard of reasonableness, and created a new standard, under which the level of rates is to be determined "by reference to the required rate of return" under Section 15a, "not by conclusions of the Commission independently" arrived at by the exercise of judgment upon the consideration of all evidence before it bearing upon the question of reasonableness.

In other words, we should understand the appellants' claim to be that the question of reasonableness is, under

the provisions of Section 15a, conclusively determined by the rate of return which has been fixed as fair under that section, and by the contribution necessary to be made from the traffic covered by rates under consideration to yield its proportion of that return, without regard to any other considerations affecting reasonableness.

This coincides with the construction of Section 15a which was claimed by these same carriers at page 12 of their brief filed with the Interstate Commerce Commission in *Ex Parte 103*, 178 I. C. C. 539, commonly called the *Fifteen Percent Case*, on September 16, 1931, by some of the counsel who have filed their brief in this case. In that brief, following quotations from the opinion of this Court in the *Dayton-Goose Creek Case*, 263 U. S. 456, they said:

> "The statements which we have quoted from this opinion show that rates, otherwise reasonable, become unreasonably high if the general schedule of rates, of which they are a part, produces more than the fair return prescribed by law. *It follows, irresistibly,* from this conclusion that the converse is true—*that rates, otherwise reasonable, become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the prescription of Section 15a. It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling.*" (Italics ours)

The appellants, however, after first presenting in their brief the language we have quoted, seem to make retreat from that claim, and to present another. Proceeding with their discussion as to the construction of Section 15a, they, at pages 94, 95 and 101 of their brief, say:

> "The duty imposed is to be performed by the Commission 'in the exercise of its power to establish just

and reasonable rates.' This power had already been conferred by Sec. 1. Prior to the enactment of Sec. 15a it had long been recognized that there was no absolute measure of a reasonable rate but that there was a zone of reasonableness within which any rate might be reasonable and just under Sec. 1. Such fact was recognized by the court in *American Express Co.* v. *Caldwell*, 244 U. S. 617 (624). In the fixing of rates under Sec. 1, considered independently of Sec. 15a there is therefore a certain latitude of judgment to be exercised.

"In *Grain and Grain Products*, supra, the Commission, speaking of the phrase 'lowest possible lawful rates' referred to in the resolution, said:

> 'It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the *lowest rates falling within those flexible limits.* ***'

The 'lowest possible lawful rates' are thus defined as the 'lowest rates falling within the flexible limits of the Commission's discretion.' This of necessity means that there are other and higher rates which might, within the limits of such discretion, have been established, and if established, would have been reasonable and lawful.

"The effect of Sec. 15a is to require the Commission so to exercise this discretion. Otherwise the requirement of Sec. 15a that the Commission shall so exercise its powers under the earlier sections as to produce such result, is meaningless. ***

"Sec. 15a does not prohibit the Commission from reducing particular rates or classes of rates when clearly unreasonable, i. e., above the upper boundary of the zone of reasonableness. It does forbid the Commission, (in a case where the existing rates are above the upper boundary of the zone of a reason-

ableness, just as much as in a case where the existing rates are within the zone of reasonableness), either to fix *all* rates at the lowest possible lawful level, thus preventing *all* possibility of achieving the statutory rate of return, or to fix the rates of any major description of traffic at the lowest possible lawful level, where the effect is *pro tanto* to prevent the receipt of such return. The Commission may not, therefore, establish the lowest possible lawful rates on a substantial volume of traffic, where the carriers' rate of return is at the time inadequate, or in the absence of a specific finding that it exceeds or in the near future will exceed the statutory rate."

This then appears to be the appellants' construction of Section 15a, so far as it places an obligation upon the Commission;—that it requires the Commission, when prescribing rates (if the carriers are not receiving the Section 15a return) to place such rates as high as they can be placed without exceeding the bounds of reasonableness. It is this alleged requirement of the section, to which they claim the Commission failed to give effect by reason of a misconception of the true construction of the section.

To prevail on this branch of their case, the appellants must establish this failure to give effect to Section 15a, by what appears on the face of the Commission's report. They rely upon the following: (1) That the Commission's order substantially reduced the general level of the rates involved at a time when the appellants were not receiving the Section 15a return. (Appellants' Brief, page 82): (2) That the Commission in its report, referring to Section 15a, used the following language: "which (section) we construe to permit, but not to guarantee, the carriers to earn 5.75 percent on the fair value of the property devoted to the transportation service." (Appellants' Brief, page 110.) (3) That Commissioner Meyer, in his concurring report, referring to the rates prescribed, said that the same were "the lowest rates on this traffic which can be lawfully prescribed." (Appellants' Brief, page 103).

To summarize, the appellants claim (1) that Section 15a requires the Interstate Commerce Commission to prescribe rates as high as they can be made without exceeding the bounds of reasonableness, if that be necessary to yield the carriers the Section 15a return; (2) that it appears from the report that the carriers are not receiving the Section 15a return; (3) that it also appears that a substantial reduction in the general level of grain rates has been made by the order; and (4) that it further appears that the Commission fixed the rates prescribed as the "lowest possible lawful rates" which "of necessity means that there are other and higher rates which might *** have been established, and if established would have been reasonable and lawful."

Inasmuch as the appellants' entire claim respecting misconstruction and misapplication of Section 15a depends upon establishing this last contention, viz. that the rates prescribed are the "lowest possible lawful rates", in the sense of being lower than other reasonable rates which the Commission might have established, we proceed to a discussion of that claim.

(a) The Rates Prescribed by the Interstate Commerce Commission Conformed to the Requirements of Section 15a According to the Appellants' Own Construction of that Section.

If, for the purposes of immediate argument, we accept the construction of Section 15a which appellants present (and we accept it for such purpose of argument only), the rates prescribed by the Commission conform to the requirements of the section. It is only by rejecting the plain terms of the Commission's report and order, and by substituting their own, that the appellants can make argument otherwise.

The carriers claim that Section 15a requires the Commission to fix rates upon the upper border of the zone of reasonableness. That is exactly what the Commission has done. Its finding in its report upon this point is as follows:

"We find that the present rates on wheat and coarse grains and their products are *unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D.*" Rec. 111 (Italics ours).

The order of the Commission is that the carriers shall establish "rates which *shall not exceed* those prescribed in Appendix D." (Rec. 274)

Since the appellants admit that rates which were found by the Commission to be above the zone of reasonableness may be reduced to the upper border of that zone notwithstanding the carriers may not be earning the Section 15a return, there is no ground afforded by the language of the report and order for the complaint that the rates prescribed do not conform to the requirements of Section 15a as so construed. The rates prescribed are found by the Commission to be the *maximum rates which can be enforced without passing the bounds of reasonableness.* They conform to the appellants own construction of Section 15a.

(b) The Phrase "Lowest Possible Lawful Rates" Can Not Be Substituted for the Actual Language Used by the Commission.

The appellants, however, seek to make good their claim by doing violence to the report. They say, on page 103 of their brief, "The rates prescribed were prescribed *as the lowest possible lawful rates.*" This assertion flatly contradicts the language of the report and the order. The appellants seek to sustain their contradiction by quotation of two fragments from the concurring report of Commissioner Meyer. At page 103 of their brief appellants say:

"Commissioner Meyer, whom the report shows to have been the Commissioner in immediate charge of the proceeding said:

'The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed.' (R. 150)

Later on, answering the demand of certain interests for reduction in the export rates, the Commission says:

'*** But even if they (emergency export rates established by the carriers) had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. ***' (R. 153).

These statements in Commissioner Myer's report the appellants treat as the equivelant of a declaration that the rates prescribed are "the lowest possible lawful rates"; and they build the entire structure of their argument concerning Section 15a on the substitution of that phrase for the language which Commissioner Meyer actually used, and thereupon the substitution of such altered language of Commissioner Meyer for the language in the report and order, actually used by the Commission. Having made the substitution, they reach the conclusion that they have established invalidity of the order.

The complete answer to the argument of the appellants is that there is nothing in the report of the majority of the Commission to support the substitution of language which they attempt, or which can be construed to effect the equivalent of such substitution.

The appellants quote from the Commission's report the following:

> "The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions and ton-mile and car-mile earnings on grain and other commodities, *but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to gaurantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service,* (R. 77, Appellants' Brief, page 110) (Italics are the Appellants')

The appellants assert, however, that the Commission did not conform to this requirement. At page 111 of their brief they say:

> "Section 15a while not a guaranty is more than a permission. It casts upon the Commission an affirmative duty to adjust and establish rates conformable thereto****. This duty rested upon the Commission in every part of this proceeding. Instead of recognizing the true relation of Section 15a to the general rate structure investigation and to every part of it, the Commission apparently proceeded upon the theory that the rates on the several descriptions of traffic involved in each of its numerous subdivisions were to be independently considered, the net revenues of the carriers thus becoming whatever they might become under the aggregate of the rates thus established."

It is clear that the language of the Commission's report quoted above fully recognized the Commission's duty under Section 15a. There is furthermore other evi-

dence in the report that the Commission did exactly what the appellants in the language just above quoted have said to be the Commission's duty. The Commission considered not only the revenues which would be produced by the rates fixed in this order covering grain and grain products traffic, but also the revenues which would be derived from rates applicable to other traffic.

In its report the Commission said:

> "We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of *increased revenue already granted in certain other cases,* and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." (Rec. 149)

We point to this language quoted from the Commission's report as proof that in fixing rates in the grain case the Commission did not consider those rates independently, but considered the grain rate proceeding as a part of the general rate structure investigation, just as the appellants claim it should have done.

(c) Interpretation of the Language of the Grain Report in the Light of Other Reports of the Commission.

What the Commission in the grain report meant to declare to be its duty under Section 15a seems clear enough from the language it used in that report, but if there be any possible ambiguity about it, which would justify such resort as the appellants attempt to other reports,—to the separate reports of individual Commissioners, and to former reports of the Commission itself, such as the *Ann Arbor Case, Muller & Co.*, v. *Pere Marquette R. R., South Carolina Produce Assn.* v. *Aberdeen R. R. Co.*, and the *Ogden Grain Exchange Cases,* cited in the appellant's brief, all decided by the Commission before the Hoch-Smith Resolution was interpreted by this Court,—then

reference to reports of the Commission where the question of construction of Section 15a was explicitly dealt with, and where some of the language used in that connection in the grain report was first used, will make the true meaning of the language of the latter report entirely clear, and will show that the Commission in the grain case construed Section 15a as placing upon it the duty to do exactly what the appellants say it should do under that section, viz, everything within its power in the performance of its duty to enable the carriers to receive the return fixed under Section 15a, short of permitting rates to be maintained which would exceed the bounds of reasonableness when measured by the standards prescribed by the Interstate Commerce Act.

We cite some of those cases in the paragraphs following, which show that from the time of the enactment of Section 15a until now the Commission has continued to construe Section 15a as placing upon it a duty to do all within its power to enable carriers to receive the Section 15a return, but without allowing the imposition of rates passing the bounds of reasonableness.

Rates on Grain, Grain Products and Hay, decided October 20, 1921, 64 I. C. C. 85. In this case, at page 98, the Commission said:

> "We are to administer, and, so far as possible, give force and life to all the provisions of the interstate commerce act. Section 1 requires that no more than just and reasonable rates for transportation be exacted, and in determining what is just and reasonable it has always been recognized that, among other factors, not only the cost of service, but its value to the user, must be considered. In the exercise of our power to prescribe such rates, however, we are now required by Section 15a to initiate, modify, establish, or adjust rates (as that term is defined in the section) so that carriers as a whole or in designated rate groups will, under proper standards of operation, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair re-

turn upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. ***

"The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. *It is plainly our duty to do everything in our power to carry out this purpose.* The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of the provision of the law. *** The rate adjustment can not with advantage be made dependent upon fluctuations in traffic.

It is also to be noted that *the duty cast upon us by section 15a is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers,* nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. *What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return.*" (Italics Ours)

Reduced Rates, 1922, 68 I. C. C. 676, 730;

"Our function under the law is not that of mere computers and can not thus be atrophied. The duty to prescribe rates for the future carries with it the obligation to exercise an informed judgment upon all pertinent facts, present and past, in order to forecast the future as best we may. *** *'The duty cast upon us by section 15a is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers, nor is the obligation cumulative'.*" (Italics ours)

It will be noted that in the first case cited, which was the first in which the Commission construed Section 15a,

the Commission said that Section 15a was "not a guaranty," and that these same words were repeated in *Reduced Rates, 1922.* In each case, however, the utterance was in connection with such a discussion of the Commission's duty under Section 15a as aids the construction of its utterance in its report in the grain case to the effect that it construes the section "to permit, but not to guarantee, the carriers to earn 5.75 percent."

The Commission in these early cases declared that under the Act it was the Commission's duty to do *everything in its power to enable the purpose of Section 15a to be accomplished,* but that Section 1 required "that no more than just and reasonable rates for transportation be exacted." In other words, the section "permits" the carriers (through the requirement it lays upon the Commission) to receive *reasonable maximum rates upon all traffic, to the end that they may earn the Section 15a return,*—but no more than such rates. This is the meaning of what the Commission said touching the same matter in its report in the grain case.

Rates and Charges on Grain and Grain Products, 91 I. C. C. 105. In this case the Commission, negativing a claim that the rates under consideration should be reduced without consideration of whether carriers were making the return fixed as fair under Section 15a, after referring to language which had been quoted from the *Dayton-Goose Creek Case,* at page 155 of its report, said;

> "This does not forbid us to consider the net return of the carriers but merely says that we need not when considering a particular rate or class of rates. The matter is for our sound discretion. Nor does it limit or qualify our duty under the above-quoted provision of section 15a. If the reduction in the particular rate or class of rates has no substantial effect upon the aggregate carrier revenue there may be no occasion for considering the latter duty. If, on the other hand, it has a substantial effect upon the aggregate revenue, such occasion arises."

"The general policy of the law is thus stated by the court in the same decision:

> 'The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission *** by fixing adequate rates for interstate commerce, *** to secure a fair return upon the properties of the carriers engaged.'

> "But even if Congress had not thus announced a fixed policy, being public utilities they are entitled as individual entities to receive from all their rates, revenues sufficient to pay expenses and a reasonable return upon the value of their properties, economically and efficiently managed, if obtainable through rate schedules not inherently unjust."

Rate Structure Investigation, No. 17,000, Part 2, Western Trunk-Line Class Rates, 164 I. C. C. 1. The Commission's decision in this case was handed down on May, 6, 1930, approximately two months before the Commission's decision in the grain case. The report discloses that the Commission in prescribing class rates in that proceeding gave careful consideration to the amount by which carriers' revenues fell short of the Section 15a return, and that it prescribed class rates which were designed to yield a higher percentage of profit than the carriers traffic generally for the purpose of making up the shortage shown, so far as that could be justly made up by an increase of class rates. Having considered indicated shortage the Commission, at page 181 of its report, said:

"There may be a divergence of opinion as to the amount of additional revenues to which these respondents are reasonably entitled. It may be observed that w.t.l. territory does not compose a group for computing a fair rate of return on carriers' property therein within the meaning of the act. *It is clear that the revenues obtainable from the increases in class rates herein authorized will not augment the earnings sufficiently to produce a fair return upon the carriers' property in the western group as a whole.* There is *a limit to the maximum reasonableness* of class rates if traffic thereunder is to move freely. Class-rate traffic is of such a nature that it may well be expected to *sustain rates relatively higher than other business,* giving due regard to the rate levels in adjoining territories and to *what the traffic will bear.* It comprises articles of high grade, especially the carload movement of which the great bulk consists of articles rated class 5 or higher. *** An increase averaging about 10 per cent through w.t.l. territory, which of course would mean a considerably higher percentage in some States in the eastern half of the territory, would probably bring up the intrastate rates to the level of the interstate rates, but that would yield only about $2,450,000 per year, or *a sum wholly inadequate for respondents' additional revenue needs,* especially in view of the reductions required in the interterritorial combination rates. *** *The rates prescribed herein are intended to be sufficiently high to yield a relatively greater amount of profit than class-rate traffic now contributes to the revenues of w.t.l. respondents.*" (Italics ours)

The increases in rates made in this single case, covering only that part of the Western District which is embraced within Western Trunk-Line Territory, was estimated by the Commission to produce from 10 to 12 million dollars per year additional revenues. (Rec. 534).

Ex Parte 103, 178 I. C. C. 539. This is the so-called *Fifteen Percent Case*, decided by the Commission on October 16, 1931. In its report the Commission discussed the requirements of Section 15a at page 561, as follows:

"Because of the provisions of section 15a, it is contended that rates, otherwise reasonable, perforce become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the section. Quoting from the carriers' brief, 'It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling.' Quoting again, it is said 'that the use of the expression 'just and reasonable rates'' in section 15a connotes a different meaning from its use elsewhere and recognizes the paramount financial consideration.' It is urged that the section is superimposed upon the power to prescribe just and reasonable rates in such a way that if the effect of the exercise of that power is to bring the revenues above or below the statutory level, adjustments of earnings to that level must be made by us through other changes in rates. The words 'as nearly as may be' in paragraph (2), according to this view, introduce no discretionary factor, but merely cover the mathematical impossibility of attaining the prescribed standard precisely.

"In support of this view the carriers rely chiefly upon *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456. ***

"Up to a certain point we do not differ with the carriers' interpretation of the law. We agree that our duty with respect to fixing just and reasonable rates was changed by Congress in the act of 1920, through the provision of a modified standard for our guidance. We agree that there was then introduced

into the law a new element of protection for the carriers in the public interest, a protection particularly of the credit essential to the preservation of an adequate national system of transportation. We believe that it is our duty under the Congressional mandate to exercise our powers in every reasonable and practicable way to the promotion of that end.

"But there is more than this to be said, if our full duty is to be made clear. *** Assuming that the paramount purpose of that section is the provision of adequate revenue for the carriers, it is the *actual revenue result* of a proposed increase in rates which we must have in mind, and not the effect apparent superficially. ***

"Nor is this all. In *Smyth* v. *Ames*, 169 U. S. 466, 547, the court said:

> 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services performed by it are reasonably worth.' This principle has repeatedly been affirmed by the Supreme Court. ***

"We do not understand that Congress, even if it be assumed that it could lawfully have done so, attempted in section 15a to override or discard this basic principle of the law, or that there is anything in the decisions of the Supreme Court which indicates that such a result has been accomplished. ***

"We agree with the carriers that prior to section 15a the revenue needs which we were bound to consider were those of individual carriers, although as a practical matter we have long considered all competing lines and not merely that line which can handle the business cheapest in determining the reasonableness of rates. *Receivers and Shippers Asso.* v.

C., N. O. & T. P. Ry. Co., 18 I. C. C. 440. Thereafter the standard was changed by Congress so that now we are bound to consider instead the revenue needs of the carriers in the aggregate or by groups, and *such needs were brought into the foreground and emphasized. In every reasonable and practicable way we must recognize those needs and protect the general credit of the carriers.* The direction to maintain an adequate system of transportation was reaffirmed by Congress in the Hoch-Smith Resolution in 1925, U. S. Code, T. 49, sec. 55. (Italics ours)

"But Section 15a has not, in our opinion, made revenue needs the 'paramount and controlling' factor in the determination of a reasonable general level of rates. Factors which theretofore were relevant and entitled to consideration, notwithstanding the revenue needs of individual carriers, are still relevant and entitled to consideration, notwithstanding the revenue needs of the carriers in the aggregate or by groups."

We maintain that the construction thus placed upon Section 15a by the Commission in *Ex Parte 103* was in substance the same as that which the carriers urge in their brief in the instant case, and in substance the same as the Commission has uniformly placed upon the section since it was first enacted.

Viewed in the light of this continuous construction, and of the use of phrases which in the course of such construction had been used, what the Commission said in the grain rate report is not open to any other construction than one which accords with what it had said respecting its duty under Section 15a in other reports. It did not, in the grain rate report, discuss its duty with elaboration, but what it said was plain. We quote briefly:

"The question here presented is whether, under present conditions, the rates on grain and grain

products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act. ***

"The percentage rates of return of Class I carriers in the western district, by regions, for the calendar years 1921-28 were as follows: *** During the seven years after the termination of Federal control these roads were short $189,775,069 of making a 5.75 per cent return on property investment and $136,265,151 short of that return on our valuation. In the year 1927 the corresponding shortage was $12,758,736 on our valuation. (Page 627) ***

"We find that the present rates on wheat and coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D. (Page 661) ***

"The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different checks and estimates. While the reductions far exceed the increases, and the corresponding revenue effects will

be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." (Page 697)

We make the following further comments only:

The Commission at the outset stated that it must consider not only transportation conditions, and the ton-mile and car-mile earnings on grain and other commodities, and whether under present conditions the rates on grain and grain products are reasonable and just and properly related to each other and to the rates on other traffic, but also "whether *the general level of rates on all traffic* as a whole is sufficiently high to accord the carriers the *rate of return contemplated by law, including section 15a.*"

Obviously, the purpose of considering the last factor, was so that the rates which the Commission should prescribe on grain and grain products should be placed at a level *to yield their proper share of the fair return required by the carriers under Section 15a,* and so that they *might be properly related to rates on other commodities* fixed to yield *their fair share of such return.* There could be no other purpose in its consideration.

Finally, in its concluding general comment, on page 697 (Rec. 147), from which we have quoted, the Commission asserted that the action taken by the order "represents the *fullest possible* response to *all* the mandates of the law affecting, among other things, the important sub-

jects of levels, *** and the maintenance of an adequate system of transportation."

Quoting this language on page 112 of their brief, the appellants, from the fact that the Commission found that the readjustment "will not threaten the maintenance of an adequate system of transportation," draw the conclusion that the Commission considered itself, as to rates on agricultural products affected by depression, "relieved of its duty to give effect to the requirements of Section 15a" when that finding could be made.

The appellants rest this conclusion on the following reasoning.

They say, at page 113 of their brief:

> "The words 'the maintenance of an adequate system of transportation' employed by the Commission in both cases were lifted bodily from the third paragraph of the Hoch-Smith Resolution."

They point out that in its report in the California deciduous fruit rate case the Commission made a like finding, saying:

> "It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

They then quote from this Court's opinion in the *Ann Arbor case* setting the Commission's order aside, and thereupon state their conclusion as follows:

> "In this case as in that case the Commission was thus proceeding on the erroneous assumption that it was empowered, if not directed, to reduce the rates on agricultural products affected by the depression, notwithstanding, as appears from the report in this case and as was stated in the report in that case, that the carriers' rate of return was below that contemplated by Section 15a, provided only the Com-

mission was of the opinion that the reductions required would not threaten the maintenance of an adequate system of transportation."

The language of the report declares the fullest possible response to all the mandates of the law. This was the equivalent of a declaration that the Commission had placed the rates covered by its order at the highest level consistent with the standards prescribed by the Interstate Commerce Act.

It should be remembered that the "maintenance of an adequate system of transportation" was the purpose which underlay the Transportation Act and Section 15a, and that the Hoch-Smith Resolution reaffirmed that purpose. Accordingly, the use of those words in connection with a declaration of the Commission's compliance with Section 15a can not be taken to negative what the Commission said, and to carry the implication that the Commission proceeded under some construction of the Hoch-Smith Resolution incompatible with the continuing requirements of the Interstate Commerce Act.

(d) The True Construction of Section 15a.

To this point in this section of our brief we have accepted the appellants' construction of Section 15a; and we have pointed out that the Commission appears to have applied to that section a like construction. If that be true, then no matter whether the construction be a true construction or an erroneous construction, the appellants have no occasion for complaint, since it is the most favorable construction for the appellants which could be given it.

Our acceptance of that construction, however, has been for the purposes of argument only. We believe the construction to be plainly erroneous. We shall now examine the question further, and the applicable decisions of this Court, for the purpose of discovering, if we can, the true construction of Section 15a.

The situation which led to the enactment of Section 15a is described at page 89 of the appellants' brief. The Fifth and Fourteenth Amendments, restrained the Federal and State Governments, respectively, from imposing upon any railroad an unreasonably low schedule of rates, whereby such railroad was prevented from receiving sufficient compensation for its services to pay the cost of operation and a fair return upon the value of its property devoted to rendition of those services.

Theoretically the Constitution thus protected each railroad against the imposition by public authority of rates so unreasonably low as not to afford a fair return. Due to the competitive relationship of the railroads, however, it did not in fact afford that protection in all cases. By restriction of the rates upon any railroad of a competitive group the rates of all competing roads could be in effect restricted irrespective of their values and their earnings, because, unless such competitors met the rates of the restricted carrier, traffic between all competitive points would be lost to that carrier. Hence, as a practical matter, the constitutional rule could be invoked by competing roads only when they were severally able to make a showing of confiscation. Hence poorly located roads, with restricted traffic, were compelled to meet such rates as might be imposed upon their most fortunately located and strongest competitors, without regard to the effect upon their own earnings. This was the mischief which Section 15a was enacted to cure.

By Section 15a Congress provided for group rate-making. This was a device whereby all roads in any rate group should enjoy collectively, by virtue of the provisions of the section, a right similar to the right theretofore enjoyed by the several roads of the group individually, by virtue of the Constitution.

Section 15a further aimed to assure adequacy, and a certain degree of stability and certainty, as to the percentage of return which should be considered fair by the regulatory agency. Instead of leaving that percentage

to be fixed by the Commission each time the question might be before the Commission in a rate case, paragraph (3) of the section provided "The Commission shall from time to time determine and make public what percentage *** constitutes a fair return", and "such percentage shall be uniform for all rate groups." The paragraph also provided that in making this determination the Commission should "give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

The reason for enactment of the section was declared in paragraph (5). That purpose was to enable the Commission "to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation."

It was recognized that the establishment of uniform rates would enable some carriers to receive income "substantially and unreasonably in excess of a fair return on the value of their railway property", and the recapture provision was accordingly provided.

By paragraph (2) of the section the Commission was directed as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return

upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

These are the features of the directions given to the Commission in paragraph (2), in the order in which given:

(1) The Commission is to act only in the exercise of its existing power to prescribe just and reasonable rates;

(2) The Commission is to establish rates "so that carriers as a whole *** will *** earn *** as nearly as may be, to a fair return upon the aggregate value" of their properties;

(3) But this shall be only under "honest, efficient and economical management, and reasonable expenditures for maintenance."

The first and the final directions were designed to insure rates reasonable to the public.

It seems patent that the prime purpose of Section 15a was to place the stamp of Congressional approval upon the consideration of carriers in groups, in the making of competitive rates, and upon the determination of the reasonableness or unreasonableness of the levels of such rates upon consideration of the aggregate return upon the aggregate of the values of the properties of all such carriers in place of consideration of individual carrier returns and individual carrier values.

This cures the mischief that Section 15a was enacted to remedy. It is the object declared in paragraph (5) of the section. It is in accord with the language of Section 15a.

The carriers have not been content with the advantages the Act plainly gives to them. They have demanded more. In the grain rate case before the Commission, and

in the Court below, they have made fantastic claims, as witness the Commission's decision in *Ex Parte 103*, hereinbefore quoted in this brief.

In this Court in this case their claims are more moderate, but we think go beyond the plain intent of Section 15a. What is that intent?

Aside from the recapture provision, and the provision as to the determination and publication of the percentage rate for the fair return to be earned, and the factors to be considered in determining that rate, Section 15a provides only for the substitution of an aggregate rate base, and the consideration in connection therewith of the aggregate return of all the carriers in a group in place of individual rate bases and individual returns.

What Section 15a does is to authorize and direct the Commission in making rates for any rate group to proceed exactly as if all the roads in that group were held by a single owner, and, so far as a fair return is concerned, to aim to produce, as nearly as may be, a fair return from the aggregate earnings of all such roads, upon the aggregate value of all, equal to the percentage which has been fixed under paragraph (3) of the section.

Too much significance has been attached by the carriers,—and perhaps by the Commission,—to the fact that paragraph (2) provides "In the exercise of its power *** the Commission *shall* *** establish *** rates so that carriers as a whole *** will *** earn *** a fair return upon the aggregate value" of their properties. Emphasis is laid upon the word "shall", whereas it should be laid upon the words "as a whole" and "aggregate value."

The direction goes to the establishment of rates which shall yield an aggregate fair return on the aggregate value of all roads rather than individual fair returns on the values of individual roads. It is, notwithstanding, a direction to establish rates to yield the prescribed aggregate return, but it does not rise above the requirement of the Constitution, applicable in the absence of the statute, that in the exercise of its power to prescribe just and

reasonable rates the Commission shall so establish such rates that each carrier will earn a fair return upon the value of its own property.

To the mandate of the statute the Commission owes the same obedience as, before the statute was enacted, it owed to the mandate of the Constitution, with respect to individual returns. It must aim to establish rates which will yield the fair return which has been fixed under the section. In fixing rates to provide that return, it is to consider exactly the same factors or standards of reasonableness as it formerly used in fixing just and reasonable rates, with these exceptions only:—that before Section 15a was enacted in each rate case, so far as value and return on value were concerned, it gave consideration to individual road value and individual return thereon, and aimed to provide such rate of return as in the particular case before it appeared to be fair, whereas now, whenever it fixes rates, so far as value and return on value are considered, it is required to have in mind the aggregate value of all roads and aggregate return thereon, and at the uniform rate which has been prescribed under paragraph (3).

Such is the rule of rate-making prescribed by Section 15a, and, to the same extent that the constitutional fair value rule applied in the case of individual roads before Section 15a was enacted, this rule applies in every sort of rate case wherein the Commission is called upon to initiate, modify, establish, or in any way adjust or regulate the amount which carriers shall receive for their transportation services.

(c) The Opinions of This Court in Which Section 15a Has Been Construed or Discussed.

An examination of the several opinions of this Court in which Section 15a has been construed or discussed will confirm the construction which we have here presented.

The first of these cases was *Wisconsin Railroad Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 585. The Court in its opinion, referring to Section 15a, said:

> "The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers *as a whole*, or in groups selected by the Commission, to earn an *aggregate annual net railway operating income equal* to a fair return on *the aggregate value* of the railway property used in transportation. ***
>
> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to *fix rates* and to take *other important steps* to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill." (Italics ours)

In *New England Divisions Case*, 261 U. S. 184, 189, the Court discussed the general purpose of Transportation Act, 1920, as follows:

> "Transportation Act 1920 introduced into the Federal legislation a new railroad policy. *** Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. *** And to attain it, new rights, new obligations, new machinery, were created. The new provisions took in a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. *** By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There

was a limit to what the traffic would bear. A 5 per cent increase had been granted in 1914 (Five Per Cent Case, 31 Inters. Com. Rep. 351; 32 Inters. Com. Rep. 325); 15 per cent in 1917 (Fifteen Per Cent Case, 45 Inters. Com. Rep. 303); 25 per cent in 1918 (General Order of Director General, No. 28). Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary *to avoid unduly burdensome rate increases* and yet *secure revenues adequate to satisfy the needs of the weak carriers.* To accomplish this two new devices were adopted: the *group system of rate making* and the *division of joint rates* in the public interest." (Italics ours)

Dayton-Goose Creek Railway v. *United States,* 263 U. S. 456, 478, was the next case. This was a suit brought to restrain the Commission from enforcing the recapture provision of Section 15a against the plaintiff. In its opinion the Court enlarged upon the illuminating discussion contained in the *New England Divisions Case.* Referring to that case, and to the *Wisconsin Case,* the Court said:

"In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It *aims to give* the owners of the railways *an opportunity to earn*

enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control. ***

"Title 4 of the Transportation Act, embracing Secs. 418 and 422, is carefully framed to achieve its expressly declared objects. *Uniform rates enjoined for all shippers* will tend to divide the business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, *the business would seek the stronger roads with the lower rates,* and congestion would follow. The *directions given to the Commission in fixing uniform rates* will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. *** By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net

returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

"Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

"*First.* Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are *reasonable from the standpoint of the individual shipper in that section.* He, with every other shipper similarly situated in the same section, is vitally interested in having a system which can do all the business offered. *** This conclusion makes it unnecessary to discuss the question mooted, whether shippers are deprived of constitutional rights when denied reasonable rates.

"It should be noted that, in reaching a conclusion upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. ***

"*Second.* The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, *is not entitled, as of constitutional right,* to more than a fair net operating income *upon the value of its properties* which are being devoted to transportation. ***

"The reduction of the net operating return provided by the recapture clause is, as near as may be,

the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. *** If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair. ***

"It is then objected that the government has no right to retain one half of the excess, since, if it does not belong to the carrier, it belongs to the shippers, and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper, as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier, due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier." (Italics ours)

This case has been much relied upon by the appellants as establishing the law to be, since Section 15a was enacted, that rates are necessarily unreasonably low if they are not producing the aggregate return on aggregate value contemplated by that section. They emphasize the words:

"Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section."

It may be noted that this language is in the nature of a *dictum*. No shipper was before the Court, and no shipper's right was in litigation. More important, however, is the fact that the language was not directed towards establishing aggregate return on aggregate value as the sole test of reasonableness. Whether it was or not such a test was not under consideration by the Court.

The situation is clear. The carrier denied the constitutionality of Section 15a. The Court in effect stated that the validity of the provision could be established only by showing that the rates which the carrier had received were unreasonable as to it while reasonable as to shippers. The discussion in the opinion was directed towards establishing those two propositions. The Court said that Congress had by Section 15a established two standards of reasonableness,—one for the shipper and one for the carrier. Dealing first with the shipper, the Court showed that he could not complain of deprivation of a constitutional right because the rates were reasonable as to him, and turning then to the carrier, the Court showed that it had no ground to make constitutional objection, for the reason that it was entitled to a fair return upon its own property, and no more.

The appellants have made the mistake of concentrating their attention upon a single portion of the Transportation Act (Section 15a), and of treating language used by the Court with respect to the whole Act as if limited in its application to Section 15a. At page 92 of their brief in this case they quote from *New England Divisions Case*, citing also the *Dayton-Goose Creek Case*, and comment thereon as follows:

> "In the *New England Divisions Case*, 261 U. S. 184, 189, the Court said:
>
> 'Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 585. There-

tofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed.'

To the same effect are: *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478, and *New York* v. *United States*, 257 U. S. 591, 602.

"The purpose and effect of Section 15a was, therefore, to substitute for the old system of regulation, under which the railroads, as a whole, were permitted to earn a fair return out of the aggregate of separately established rates, if sufficiently high for the purpose, a new rule of rate-making designed to insure such a return and to impose upon the Commission the affirmative duty so to adjust rates as to accomplish such result.

"Although the purpose was to provide for the maintenance of an adequate transportation system, Congress did not leave to the determination of the Commission either the standard by which the attainment of this object was to be achieved, or the means of its attainment. It itself provided the standard by requiring that the rates should be such as to provide, as nearly as might be, a fair return upon the aggregate value of railway property, and the means of its realization by directing the Commission so to adjust the rates."

It is plain, however, from the opinions of the Court which the appellants rely upon and cite to support their construction, that the Court, when speaking of provisions "especially designed to secure a fair return on capital devoted to transportation service" was referring no more to Section 15a than to other important provisions of Transportation Act.

A foot-note to the sentence which contains that phrase in the *New England Divisions* opinion states some of those provisions as follows:

> "'Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, Sec. 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, Sec. 402, p. 477; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 66 L. ed. 566, 42 Sup. Ct. Rep. 261; to fix minimum, as well as maximum, rates, and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, Sec. 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; *New York* v. *United States*, 257 U. S. 591, 66 L. ed. 385, 42 Sup. Ct. Rep. 239; and to determine the division of joint rates."

The substance of this foot-note is also carried into the text of the opinion in the *Dayton-Goose Creek Case*, in language which we have quoted.

In none of the opinions of this Court in which Section 15a has been discussed can any language be found which, if read in proper relation to the other language of the report in which it appears, can be taken to indicate that Section 15a, in the opinion of the Court, was designed to place upon the Commission any requirement other than (1) to determine and publish the percentage of aggre-

gate value which constitutes a fair return thereon, giving consideration to the factors directed in paragraph (3); (2) to fix aggregate value of railway property for the country as a whole, or for such rate groups as it may divide the country into; (3) when acting upon rates to be thereafter imposed, to give consideration to such aggregate value and to the aggregate return thereon as factors affecting the reasonableness of rates to be fixed to the same extent and in the same way that it formerly considered individual value and individual return; (4) to consider the percentage return fixed under Section 15a as representing the fair return which the carriers should be permitted to earn, and to aim to establish rates to produce that return in the same way that it would aim to establish rates which would yield the constitutional fair return for an individual road, if Section 15a had never been enacted; and (5) finally, to recover and administer excess earnings as provided in the section. There is no other or further requirement.

3. THE COMMISSION DID NOT CONSIDER MATTERS OUTSIDE THE RECORD.

In their brief at pages 149-151, the appellants quote from the Commission's report and comment thereon as follows:

> "'The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different *checks and estimates*. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary

markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of *increased revenues already granted in certain* other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings.' (Italics Appellants) ***

"Its (the Commission's) findings that these reductions would not, however, threaten the maintenance of an adequate system of transportation was based upon (1) certain checks and estimates of the revenue effects of the action to be taken, and (2) the effect of action taken in certain other cases in increasing revenues. *** This was clearly a finding of fact upon a material issue and as such required to be based upon evidence. The carriers were entitled to an opportunity to be confronted with both sets of estimates, to check them, to cross-examine their makers and to offer evidence in rebuttal.

"It is alleged in the bill that none of the evidence of estimates relied on was of record in the case (R. 31-2). ***

"Moreover, checks and estimates of losses resulting from the order could not possibly have been in the record for they were checks and estimates of the revenue effects of the order itself, which could not have been determined—even approximately—prior to its rendition."

As to the matter of "checks and estimates", it is perfectly apparent from the Commission's report that these were made by the Commission itself in the course of its consideration of the case. The claim that the consideration of them renders the Commission's order void must

rest upon one or the other of the following contentions, (1) that the Commission in any rate proceeding must take the carriers to the conference table, and submit its working figures, necessary to a decision of the case, to them, or (2) that the Commission must prescribe rate scales without making any check or estimate as to the effect which they will have upon the carriers' revenues.

We do not consider it necessary to make argument to negative either of these propositions.

(a) The Consideration of Increases to be Derived from Advances in Rates on Other Commodities.

The appellants further say:

> "In so far as the effect of the supposed increases from other cases is concerned it appears from the concurring opinion of Commissioner Woodlock that chief among these cases was the so-called *Class Rates case* (R. 187) (*Western Trunk-Line Class Rates*, 164 I. C. C. 1). This case was decided long after the close of the record in the present case (R. 533). ***
>
> "The order of the Commission is thus predicated upon a balancing of estimated decreases, on the one hand, and estimated increases, on the other, neither of which were of record and neither of which the carriers ever had any opportunity to examine or correct."

This complaint disregards the nature of the proceeding in which the Commission was acting. The grain rate investigation was but a part of the general *Rate Structure Investigation*, No. 17,000, covering all of the appellants' rates for application on every description of traffic.

It would clearly be impossible to accomplish the purpose of the resolution under which that investigation was carried on, which was to bring the rates on every de-

scription of traffic into proper relation to each other, preserving, however, to the carriers revenues sufficient for the maintenance of an adequate transportation system, without giving consideration to increases in revenues which would result from advances upon other classes of traffic, when fixing rates for a particular class of traffic.

We shall make further reference to this point in the appellants' argument in the concluding paragraph of this brief. We here point out, however, that when arguing other points in their brief the appellants recognized the true character of the grain rate inquiry, and that the Commission should take into account the revenues to be derived from other classes of traffic, when fixing rates on grain and grain products (See pages 79, 80, 111 and 121 of appellants' brief).

In their brief in the court below the appellants also complained that the Commission's report contains a tabulation showing the carriers' return for the full year 1928, when the taking of evidence closed before the end of the year. The correctness of the return as thus stated was not questioned, but it was urged that evidence concerning it could not have been in the record, and that hence, under the rule laid down in *United States v. Abilene & Southern Railway*, 265 U. S. 274, the order must be set aside. There is no merit in that claim.

In the *Abilene & Southern Case* the opinion of the Court states that "objection to the use of the reports (which were not in the record) was seasonably made by the carriers and insisted upon." Here the tabulation complained of, exactly as it appears in the Commission's report, was set forth in the tentative report of the examiners, which was duly served on the appellants April 20, 1928, with opportunity for the filing of exceptions. They filed exceptions, and were heard in oral argument, but they made no objection to the consideration of the 1928 returns. Under these circumstances, they can not complain now. This assignment of error has not been argued in their brief here, and we assume has been abandoned.

4. THE ACTION OF THE COMMISSION WAS NOT ARBITRARY.

At page 155 of their brief the appellants, referring to the denial by the Commission of their petitions for rehearing, say:

> "Whether the order as originally made was valid or not, the Commission in refusing to rehear and consider, to take the evidence offered in respect of changed conditions alleged, in addition to acting arbitrarily and unreasonably, plainly failed to discharge the duty imposed upon it by Sec. 15a."

The carriers have no right to a hearing before the Commission except as the same is secured to them by the Interstate Commerce Act. The Commission is an agency of Congress which has been granted powers from Congress to determine and prescribe those rates which conform to the standards established by the Congress in the Interstate Commerce Act. When the Commission, exercising its delegated power, in the manner directed by Congress, by order prescribes rates for any carrier or carriers subject to its jurisdiction, that order is, as to all intents and purposes, a law of Congress, and can be changed only by Congress or in the manner which Congress has provided.

If Congress had by statute prescribed the rates which this order of the Commission prescribes, the carriers could have resisted those rates in court only upon the ground of their constitutional insufficiency,—a ground which is not alleged here. It could not have resisted them upon the ground that it had applied to the Congress or to the Commission to change them and without success.

If Congress had chosen to do so, it might have limited the power of its agency, the Commission, to the making of rate orders, as an initial proposition, with the provision that those orders, once made, should be subject to

change thereafter by act of Congress only. If it had so provided, and this order had been made in the exercise of such limited power, the carriers could have resisted it only upon the ground that the Commission had not pursued its authority regularly, or that it had acted arbitrarily *in the making of the order*. If the order was valid when made, they could not have resisted it upon the ground that on request to change the order the Commission had not changed it. If this order was regularly made the rates prescribed would be the lawful rates notwithstanding changed conditions unless by reason of such changes they should become confiscatory.

The Congress has delegated power to the Commission to prescribe rates, and has given to its orders the effect of law. It has not, however, left those orders beyond the reach of the Commission. It has given the Commission power, within its discretion, to revise, change, or modify its order, in any case, in which, after a rehearing, it finds that there is occasion therefor.

The applicable provision of the statute is as follows:

> "Sec. 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission *in its discretion* to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Com-

mission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly." (Italics ours)

It will be noted that no *right* to a rehearing, by reason of facts occurring after a hearing is ended, upon the basis of which an order has been entered, is given to any party. The right to a hearing before order is absolute; but after a due process of law hearing has been had, and the Commission's decision declaring the rates which the statute commands has been entered, then *"it shall be lawful"* for the Commission to enter upon a rehearing. Whether it shall do so is *"in its discretion."* If, exercising that discretion, the Commission refuses to reopen the case, the record stands, and the order which has been made, if its validity is challenged, must stand or fall upon that record.

A rate order made to take effect on a fixed date in the future, in legal effect, is like a statute enacted by Congress to become effective at a subsequent date. An application to the Commission to reopen the case, and change the order, is in effect an application to change rates prescribed by law, upon consideration by the Commission of the evidence already of record, together with such additional evidence as may be offered upon the rehearing.

The Commission in its discretion may open the old case, or it may require those who claim that the rates fixed by the outstanding order have become unreasonable, or otherwise unlawful, by reason of changed conditions to institute a new proceeding.

If the Commission denies the application to set aside the order and restore the pre-existing rates, the court can not reverse the Commission, and itself restore the former rates, without exercising a legislative power.

Whether the new facts alleged in the application, considered in conjunction with those shown by the record, make a restoration of the pre-existing rates lawful, or require a modification of the rates prescribed by the outstanding order, depends upon administrative findings which the Commission alone may make.

Congress in the statute has provided, "No such application shall *** operate in any manner to stay or postpone the enforcement (of the Commission's order) *without the special order of the Commission.*" Until such special order is entered the original order stands, prescribing the rates which Congress has commanded shall be in force.

The constitutional guaranty of due process of law does not require that parties to judicial or administrative proceedings shall be given a new trial upon a showing of proper cause therefor.

> "A hearing before judgment, with full opportunity to present all evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." *Pittsburgh, C. C. & St. L. Railroad Co.* v. *Backus*, 154 U. S. 421, 426.

When Congress in Section 16a of the Interstate Commerce Act empowered the Commission to grant rehearings "in its discretion," it must have used that phrase in its ordinary sense. It meant that the Commission should exercise discretion not subject to review, as do Judges of the federal courts, when passing upon motions for retrials. The federal rule has been stated by this Court as follows:

> "A motion for a new trial in the courts of the United States is addressed to the sound discretion

of the tribunal which tried the case, and to grant or refuse it can not be made the subject of exception." *Schuchardt & Gebhard* v. *Allen et al.*, 68 U. S. 642.

This does not mean that the carriers are without a remedy if the rates are confiscatory. They may apply to the court to enjoin their enforcement, but the inquiry of the court can go no further than to determine whether the order prescribing the rates was valid when entered and whether the rates when sought to be enjoined by the carriers are confiscatory. It can not consider the evidence and act legislatively thereon. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282.

(a) The Commission's Refusal to Prolong the Proceeding Was in Conformity With the Congressional Direction.

The refusal of the Commission to prolong the proceeding by reopening the same for further hearing as to the effect of the current depression upon the revenues of the carriers or for any other purpose, was in accord with the express direction of Congress contained in the Hoch-Smith Resolution. Farm products were involved. As to such products the concluding paragraph of the resolution directs that the Commission shall proceed "with the least practicable delay." The second paragraph, as to rates generally, directs that the Commission during the progress of the investigation, "as expeditiously as possible" shall make decisions and orders.

The investigation of rates on grain and grain products preliminary to the order had consumed several years. The petitions for further hearing presented facts of common knowledge. If the Commission was of the opinion that, if proved as alleged in the motions they would not afford ground for revoking or modifying the order, it would have been derelict to the duty imposed upon it by the resolution to proceed expeditiously if it had granted the motions.

This same injunction of expedition constituted a conclusive reason why the appellants could not be supplied with the copies of the checks and estimates made by the Commission in the course of its study of the record and the preparation of its decision, with opportunity to the appellants for a hearing as to the correctness of the Commission's estimates of the probable effect of rate changes on other classes of traffic.

If that course of procedure were afforded to carriers the Commission never could conclude the revision ordered by the resolution.

The resolution must receive such a construction, and be taken to authorize such procedure, as to make possible the accomplishment of the purpose for which it was enacted. The language following, which this Court used in the *New England Divisions Case*, 261 U. S. 184, 197, is applicable here:

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed ***. The need to be met was urgent. To require (the procedure urged by the carriers) *** would be tantamount to denying the possibility of granting relief."

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